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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| | |
|------------------------|--|
| Proceeding | 91212477 |
| Party | Plaintiff Balance Bar Company |
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| Signature | /r. glenn schroeder/ |
| Date | 01/29/2015 |
| Attachments | Cornacchiulo_Corrected_Testimony_Transcript_May_1_2014.pdf(473069 bytes) |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application Serial No. 85/751,520
Published for Opposition on March 19, 2013
Trademark: EARTH BALANCE

BALANCE BAR COMPANY,

Opposer,

v.

GFA BRANDS, INC.,

Applicant.

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Opposition No. 91212477

**OPPOSER’S NOTICE OF FILING OF MAY 1, 2014 CORRECTED CERTIFIED
TESTIMONY DEPOSITION TRANSCRIPT AND EXHIBITS OF
PATRICK CORNACCHIULO**

Pursuant to the parties’ Stipulation filed August 6, 2014 (approved by the Board on August 14, 2014), and pursuant to 37 C.F.R. § 2.125(c) and Rule 703.01(k) of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), Opposer Balance Bar Company hereby files with the Board, and notifies Applicant of, the corrected certified testimony deposition transcript and accompanying exhibits of Patrick Cornacchiulo, whose testimony deposition was taken on May 1, 2014 in Proceeding No. 91196954.

Pursuant to Section 703.01(n) of the TBMP, the transcript has been corrected by writing each correction above the original text that it corrects, each of which has been initialed by Mr. Cornacchiulo. (An Errata Sheet listing the corrections has also been included at the end of the transcript.)

Pursuant to 37 C.F.R. §§ 2.125(e), 2.126(c), TBMP 703.01(p), and the Stipulated Protective Order, approved by the Board on February 20, 2014, the following testimony deposition transcript pages and exhibits have been designated as “Confidential” and are being filed with the Board under seal, under separate cover: Pages 19-22, and Exhibit Nos. 33-49.

Respectfully submitted,

Dated: 29 January 2015

By: /s/ R. Glenn Schroeder
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Attorney for Opposer,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **OPPOSER'S NOTICE OF FILING OF MAY 1, 2014 CORRECTED CERTIFIED TESTIMONY DEPOSITION TRANSCRIPT AND EXHIBITS OF PATRICK CORNACCHIULO** has been served via US mail and email this 29th day of January 2015 upon the following:

Johanna Wilbert, Esq.
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/s/ R. Glenn Schroeder
R. Glenn Schroeder

IN THE UNITED STATES PATENT AND TRADEMARK
OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL
BOARD

-----x
In re Application Serial Nos. 77/864,206 and
77/864,268
Published for Opposition on April 20, 2010 and
August 10, 2010
Trademark: SMART BALANCE

BALANCE BAR COMPANY,
Opposer,
- and -
GFA BRANDS, INC.,
Applicant.

Opposition Numbers: 91196954/91197748

-----x
2100 Smithtown Avenue
Ronkonkoma, New York

May 1, 2014
9:30 a.m.

Deborah Rozea, Reporter

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A P P E A R A N C E S:

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For the Applicant:

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411 East Wisconsin Avenue

Milwaukee, Wisconsin 53202-4497

BY: JOHANNA M. WILBERT, ESQ.

ALSO PRESENT:

LEE GROSSKREUZ HECHTEL, ESQ.

1
2 P A T R I C K C O R N A C C H I U L O ,
3 called as a witness, having been duly
4 sworn by a Notary Public, was examined
5 and testified as follows:

6 EXAMINATION BY

7 MR. SCHROEDER:

8 Q. Please state your full name for
9 the record.

10 A. Patrick Cornacchiulo.

11 Q. What is your address?

12 A. 2100 Smithtown Avenue,
13 Ronkonkoma, New York 11779.

14 MR. SCHROEDER: Could you mark
15 these, please?

16 (Opposer's Exhibit 33, Copy of
17 multipage document entitled Agreement,
18 Bates stamped BB0001903 through
19 BB0001920, marked for identification.)

20 (Opposer's Exhibit 34, Copy of
21 multipage document entitled Settlement
22 Agreement, Bates stamped BB0001851
23 through BB0001857, marked for
24 identification.)

25 (Opposer's Exhibit 35, Copy of

Cornacchiulo - Direct

three-page letter, dated April 8, 2002,
Bates stamped BB0001848 through
BB0001850, marked for identification.)

(Opposer's Exhibit 36, Copy of
multipage document entitled Settlement
Agreement, Bates stamped BB0001843
through BB0001847, marked for
identification.)

(Opposer's Exhibit 37, Copy of
three-page letter, dated February 5,
2003, Bates stamped BB0001835 through
BB0001837, marked for identification.)

(Opposer's Exhibit 38, Copy of
multipage document entitled Settlement
Agreement, Bates stamped BB0001838
through BB0001842, marked for
identification.)

(Opposer's Exhibit 39, Copy of
multipage document entitled Agreement,
Bates stamped BB0001814 through
BB0001817, marked for identification.)

(Opposer's Exhibit 40, Copy of
multipage document entitled Settlement
Agreement and Release, Bates stamped

Cornacchiulo - Direct

BB0001818 through BB0001821, marked for identification.)

(Opposer's Exhibit 41, Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001823 through BB0001828, marked for identification.)

(Opposer's Exhibit 42, Copy of multipage document entitled Agreement, Bates stamped BB0001808 through BB0001813, marked for identification.)

(Opposer's Exhibit 43, Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001802 through BB0001807, marked for identification.)

(Opposer's Exhibit 44, Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001798 through BB0001801, marked for identification.)

(Hanging.)

Q. I've handed you what's been marked as Exhibits 33 through 44, and ask you

1 Cornacchiulo - Direct

2 to take a look at each exhibit, and then
3 identify it for me.

4 A. You want me to go one by one
5 or --

6 Q. Please.

7 A. The first one, what's the number
8 of this one?

9 Q. The exhibit number is fine.

10 A. Exhibit, yeah, 33, this is an
11 agreement with Tree of Life. It says,
12 basically discussing not using Balance,
13 Balance Foods or Balance in any of their
14 marks.

15 Q. Okay. That's fine.

16 MS. WILBERT: I am going to give
17 an objection based on foundation, just
18 given the dates of these documents, and
19 my understanding of your tenure with the
20 company.

21 Q. Let me ask you a preceding
22 question.

23 Do you recognize this document as
24 a business record of the company?

25 A. Yes.

1 Cornacchiulo - Direct

2 Q. And, just generally, if you can
3 identify each document as being, to your
4 knowledge, being a business record of the
5 company, if you can go through and look at
6 each document.

7 You don't need to speak as to the
8 contents of the document.

9 A. Well, each document is prior
10 agreements that we've received when we
11 purchased the company.

12 Q. And please look at each one and
13 refer to each one by exhibit number. That
14 would be great.

15 A. Yes, Exhibit 34 is a Settlement
16 Agreement that we received when we purchased
17 the company.

18 Q. Okay.

19 A. That was in their records.

20 35 looks like a letter we
21 received in the records.

22 Again, doesn't look like a final
23 agreement, but it looks like a letter that we
24 had some type of contesting.

25 Q. Is it a letter agreement, again,

1 Cornacchiulo - Direct

2 if you take a look at the third page of
3 Exhibit 35.

4 A. Oh, yeah, this is an Agreement
5 that we reached, yeah, yes.

6 Q. Okay.

7 A. Number 36 is a Settlement
8 Agreement. Number 38 is another Settlement
9 Agreement.

10 Q. Did you see 37?

11 A. 33, 34, 34, 35, 36. I did not
12 see 37.

13 Yes.

14 So, 37, letter agreement with
15 letterhead Kraft at the top.

16 So, 37 was an Agreement between
17 us and Kraft or Balance Company and Kraft.

18 38 --

19 Q. Let's just back up to 37.

20 37, you mentioned was on Kraft
21 letterhead?

22 A. Yes.

23 Q. So, the Agreement would have been
24 between Kraft and another party; correct?

25 A. Yes, sorry. I forget they were

1 Cornacchiulo - Direct

2 the prior owners at one time.

3 Q. If you look in the re section, it
4 looks like an agreement between Balance Bar
5 and Neways.

6 A. Yes.

7 38 is a Settlement Agreement,
8 Malt-O-Meal Company and Balance.

9 Q. Okay. Thank you.

10 A. Number 39 is an Agreement between
11 Pharmavite and Balance Bar Company.

12 Q. Okay.

13 A. Number 40 is a Settlement
14 Agreement and Release between Balance Bar and
15 Cherrydale Manufacturing.

16 Q. Thank you.

17 A. Exhibit 41 is a Settlement
18 Agreement between Balance Bar and -- I'm
19 trying to find the other name on here.

20 Q. Would it be CIASA, an
21 abbreviation?

22 A. Yes, yes, down in Mexico.

23 Q. Thank you.

24 A. And Exhibit 42 is an Agreement
25 between Balance Bar Company and Mind Mine, an

1 Cornacchiulo - Direct

2 Arizona company.

3 And Number 43 is a Settlement
4 Agreement between Zija International and
5 Balance Bar Company.

6 Q. Do you have a 44 in your hand as
7 well?

8 A. Yes, I do. I'm sorry.

9 And Exhibit 44 is another
10 Settlement Agreement, Tiens Group Company and
11 Balance Bar Company.

12 Q. Okay. Thank you.

13 Let me back up, I jumped in with
14 those documents, and I skipped over the usual
15 introductions.

16 Your full name for the record,
17 please?

18 A. Patrick Cornacchiulo.

19 Q. Where are you currently employed?

20 A. I'm employed with NBTY.

21 Q. And how long have you worked with
22 NBTY?

23 A. Over nine years.

24 Q. And your current position?

25 A. Vice-President of Marketing.

1 Cornacchiulo - Direct

2 Q. Can you describe generally what
3 that position entails, the job
4 responsibilities of that position?

5 A. Yeah.

6 My job -- I currently am
7 Vice-President of Marketing for Active
8 Nutrition which handles Balance Bar, Pure
9 Protein, Body Fortress and MET-Rx.

10 My job is to oversee, you know,
11 the financials, the marketing programs, the
12 positioning of the brand, the advertising,
13 social; basically day-to-day of any of the
14 marketing functions.

15 Q. When did NBTY purchase the
16 Balance Bar Company?

17 A. The official purchase -- was it
18 officially November? November of 2012.

19 Q. And since that time you have
20 stepped into a position where you are now
21 overseeing, as you mentioned earlier, and then
22 monitoring the company and a branch within the
23 company?

24 A. Yes, yes.

25 So, we brought it in under

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corporate marketing and then shipped it over to my division.

Officially, Erin and that division, her group reported to me ^{As of} ~~up until~~ January of this year as well as being involved in the purchasing and reviewing information when we went through the purchase decision. RC

Q. Is it your understanding that the Balance Bar Company has used different trademarks over this period of time?

Let me rephrase that question.

Is it your understanding that the Balance Bar Company owns certain trademarks?

A. Yes.

Q. And what would those trademarks be?

A. We own Balance, Balance Bar, Balance Gold, Balance Bare.

What else do we have in there?

Q. Do you use any slogans?

A. Yeah.

I mean there are several different slogans.

Off the top of my head I don't

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know which ones are actually trademarks, but we use several different slogans.

Q. Can you name any of the slogans?

A. I know the new one that we are doing is "Live today, love tomorrow". That's the new one that's coming out because they are getting, you know, more into what's going on --

Q. Okay.

A. -- for the future, but, yeah, we use a lot of descriptors around, you know, the bar taste on some of the bars and the bar function on the others.

So, I know we use different tag lines, but I can get you a short list of those.

Q. Okay.

Do you know how long the Balance Bar Company has used it's Balance and Balance Bar trademarks? Do you have an understanding of that?

A. Balance Bar has been around since the early '90s.

Q. Okay.

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A. You know, I know the different trademarks have been introduced at different times, but, you know, the company was formed in the early '90s.

Q. Okay. Thank you.

MR. SCHROEDER: Can you mark this, please?

(Opposer's Exhibit 45, Copy of multipage document, cover page being a letter dated May 9, 2011, Bates stamped BB0000816 through BB0000827, marked for identification.)

(Opposer's Exhibit 46, Copy of three-page letter dated March 9, 2012, Bates stamped BB0001924 through BB0001926, marked for identification.)

(Opposer's Exhibit 47, Copy of three-page letter dated May 25, 2012, Bates stamped BB0001921 through BB0001923, marked for identification.)

(Opposer's Exhibit 48, Copy of four-page document, cover page being a letter dated October 3, 2012, Bates stamped BB0000812 through BB0000815,

1 Cornacchiulo - Direct

2 marked for identification.)

3 (Handing.)

4 Q. I'm handing you what has been
5 marked as Opposer's Exhibits 45 to 48.

6 Could you review each one of
7 these exhibits and just generally identify for
8 me what each exhibit is?

9 MS. WILBERT: Objection.

10 Foundation.

11 Q. Do you recognize this document as
12 a business record of the company?

13 A. Yes.

14 Q. Can you identify what it is?

15 A. Trademark infringement.

16 So, unauthorized use of Balance
17 Bar Company's Balance and Balance Bar
18 trademarks.

19 Q. Is it a letter from one of the
20 prior law firms that worked for the Balance
21 Bar Company?

22 A. Yes, yes.

23 Q. Thank you.

24 Can you look at the next exhibit,
25 46?

1 Cornacchiulo - Direct

2 A. Yes.

3 Q. Is that also a business record of
4 the company?

5 A. Yes.

6 And it's another letter. It's
7 another letter. It seems to be contesting
8 trademarks on behalf of the use of Balance and
9 Balance Bar.

10 Q. Okay. Thank you.

11 Exhibit 47?

12 A. Another letter that was issued
13 from the company, the prior ownership, Balance
14 Bar Company to -- I think Balance and Balance
15 Bar trademark infringement.

16 Q. Okay. Thank you.

17 And Exhibit 48?

18 A. Another letter that was issued,
19 and this is, again, another trademark
20 challenge of Balance and Balance Bar.

21 Q. Okay. Thank you.

22 Now we just looked at some
23 Settlement Agreements and at some cease and
24 desist letters issued by prior Counsel for the
25 Balance Bar Company.

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Are you aware of the policing activities that Balance Bar Company took in the past with respect to its Balance and Balance Bar trademarks?

A. Yes.

Q. To the extent of your knowledge, can you describe generally what those policing activities were?

A. The Balance Bar Company ~~placed~~ ^{polices} very close into the bar category. RE

So, obviously, you know that's the category that Balance Bar stands in. So, they were very strong on anybody infringing in the bar category, highly.

And they reviewed a lot of close in categories or products that would, you know, infringe on that; from vitamins to supplements to drinks or anything that would be in that category.

Q. Okay. Thank you.

Going forward will the Balance Bar Company continue to police its trademarks?

A. Yes, yes.

It's very important for us to

Cornacchiulo - Direct

maintain our brand equity within the category.

(The following portion has been
deemed confidential and bound under
separate cover.)

1 Cornacchiulo - Direct

2 MR. SCHROEDER: We can end the
3 confidential portion of the transcript.

4 Can you mark this as Exhibit 49.

5 (Opposer's Exhibit 49, Copy of
6 multipage document entitled NBTY Active
7 Nutrition Tracker, Pre-Campaign Topline
8 April 2013, Bates stamped BB0001955
9 through BB0001974, marked for
10 identification.)

11 Q. I have handed you what's been
12 marked as Exhibit 49.

13 Do you recognize this document?

14 A. Yeah, this is our Active
15 Nutrition Tracker to track information about
16 the brands and how they are performing.

17 Q. Let me just ask you a few
18 questions.

19 Millward Brown, who are they?

20 A. Millward Brown is an outside
21 research firm, and part of their function is
22 brand and awareness and consumer insights.

23 Q. So, is that a company that you
24 hired to perform this study?

25 A. Yes.

1 Cornacchiulo - Direct

2 Q. How often are these studies done?

3 A. These studies, off the top of my
4 head, I think they are done quarterly, I
5 think.

6 I know we have looked into doing
7 them more often, but I think quarterly is the
8 best way to do them.

9 Q. And is this something that the
10 company pays to have done on their behalf?

11 A. Yes.

12 Q. Could I ask you to turn to what's
13 marked BB1959. It's actually Page 5 of the
14 document.

15 A. Yes.

16 Q. That page and the following page.
17 Can you explain what kind of data
18 is set forth on this page, and generally what
19 some of this data means to you?

20 A. Yeah.

21 This is a brand awareness page
22 for the general population, unaided and total.
23 So, basically it gives you measurements of the
24 brand's awareness amongst all people within, I
25 will say, you know, the store set.

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So, it doesn't matter if they shopped your category or didn't shop your category. It just shows you what type of awareness you have in the general population.

Q. And the difference between unaided awareness --

A. And aided.

Q. Unaided and aided.

A. Right.

Q. Can you describe the difference between the two?

A. Unaided is just recollection, off the top of your mind.

Aided, you know, given a stimulus of some sort of a brand name.

So, it's like if I walked up to the shelf, and I saw a shelf set with a brand name on it, I would be like oh, yeah, I recognize that.

But unaided would be right off the top of their mind.

Q. Okay.

The date of this study is April 2013; correct? It appears on the first page.

1 Cornacchiulo - Direct

2 A. Yeah, yeah. Yup.

3 Q. Now, the document is dated April
4 2013.

5 Do you have any idea how long ago
6 these studies would have been done with
7 respect to that date? Is it within a month of
8 that date, two months of that date? Do you
9 have any idea?

10 A. On the first page it says date of
11 the study, it looks like March 18th through
12 March 31st.

13 Q. Okay. Thank you.

14 Can we turn back to Page BB1959?

15 When you look at the graph across
16 the bottom of that page, can you just speak
17 generally to what those numbers mean to you as
18 you look across the various products that
19 appear?

20 So, for example, I see Balance
21 Bar has what looks like an unaided awareness
22 of 4. I guess that's 4 percent and aided
23 awareness of 34 percent.

24 Is that how you read those
25 numbers?

1 Cornacchiulo - Direct

2 A. Yes, exactly.

3 Q. And how do those numbers compare
4 with other brands in the marketplace?

5 A. With brands within our category
6 we are in definitely the mid range, you know,
7 to the upper range because the brands that
8 play within our category; Pure Protein,
9 MET-Rx, Clif, Clif Builders, Kind, Lara,
10 Detour, PowerBar, Supreme and Zone. Those are
11 mainly the bars that are within our set.

12 You can see most of those range
13 from 11 to 60 and Balance Bar is at 34 of
14 total awareness.

15 And then if you look at unaided,
16 some of them have no response up to 17 and
17 **B**alance is at 4.

18 Q. Okay.

19 A. But most of them are 4 or less.

20 Q. And if you turn to the next page,
21 we are looking at category users.

22 How do those numbers change?

23 A. Aided awareness increases for
24 most brands because usually with the category
25 users they know the brands better than the

1 Cornacchiulo - Direct

2 general population.

3 But, again, the range goes from
4 18 to 75 for our shelf set, and we are at 49
5 aided.

6 And if you look at the unaided,
7 again it ranges from 0 to 29 for Clif Bar and
8 Balance is at 4.

9 Q. Okay.

10 Let me ask you to turn to the
11 next page of this document, BB1961.

12 Can you explain generally what's
13 being measured and what's being shown on these
14 charts and a little bit of information about
15 what loyalty in the category means to you?

16 A. Yeah, so -- and, again, I'm not
17 the analyst -- but the perception of this
18 chart is they're asked questions, and based on
19 how they respond to the questions goes from
20 their awareness, to their consideration, to
21 what they perceive their usage into, you know,
22 they are heavily buying.

23 So, that's how you get a loyalty
24 rate.

25 So, it's a little bit different

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than pure shopper data, when you get into shopping data you get the real purchase habits exactly down to a T.

So, this is, you can see Balance versus Clif versus Luna.

You will see Balance and Clif, you know, how the numbers appear here will appear a little bit lower than what the shopping data will say.

So, okay, this takes you down from the 49 awareness that we said, to would they consider buying it at 43, to ever used at 21, to currently using at 7.

So, as the questions are asked you can see the complexity of the person's decision, you know, on how they decide on this brand.

Because I know Clif, for example, 34 here is, you know, their strong loyalty at 34 is less than what they normally would be in the real shopping behavior and how you define loyalty.

But the consumer is strong there.

Balance you have that conversion

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of 15 percent from currently using to loyalty.

So, you know, that conversion --

Let me give you the numbers again. Sorry.

The numbers to the right are conversion numbers. So, you want to see those conversion numbers being pretty strong going down.

So, as you can see, you know, we're half of Clif, but you know, if you pulled in some of the other lower players that are lower on the awareness you would see that Balance is above them.

So, again, I would say we are probably middle of the pack. These are the stronger players in the category on conversion.

Q. The 15 percent, does that represent a loyalty rate or is that just the number that is used in this particular type of analysis?

A. That's the number that's used. That's not the true shopping loyalty. It's a consumer's response to questions.

RC

1 Cornacchiulo - Direct

2 And, like I said, I'm not the
3 analyst. I can't give you the exact data
4 behind it, but --

5 Q. Do you have an understanding --

6 A. -- you want to see that
7 increasing over time as you, you know, invest
8 in the brand.

9 Q. Do you have an understanding of
10 what the brand loyalty is for the Balance Bar
11 products currently?

12 A. Yeah.
13 Approximately 30 percent loyalty
14 rating right now, and that is, again, I would
15 say middle of the pack for this category.

16 Q. Thank you.

17 Let's talk a little bit about how
18 a typical consumer purchases a nutrition
19 energy bar.

20 Can you speak about that a little
21 bit? What drives a consumer to buy a
22 particular bar?

23 A. Yeah.

24 We just went through extensive
25 studies to understand how they go through

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their purchase decision.

They come in through what we call need states.

So, for Balance Bar, Balance Bar falls in what we call on-the-go nutrition driven.

So, they are looking for a specific healthier benefit. They are looking to live a good lifestyle, and that's what the Balance Bar consumer is after.

So, they are a label reader. They come in. They look for specific ingredients. They look for specific nutrition. They're looking for good benefits, and that's how they make their choices.

Q. You mentioned a label reader.

Does that mean someone who is reading the front of the label, the back of the label? What does that mean to you?

A. Balance Bar and Balance consumers, they read everything. They read the ingredients, the nutrition facts, the front label.

A little bit different than some

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of my other products. Some of my other products are front label readers only because they are looking for specific facts, quick and simple. They are after one specific nutrition benefit.

Where Balance, that consumer within, you know, that's tied into that category is looking ^{far}~~for~~ down to the ingredients. They are looking at gluten free. They are really trying to understand the product more.

Q. Can you speak a little bit to the price point of these products? What do they typically sell for?

A. They could range from ninety-nine cents to a buck forty-nine a bar, per bar.

So, that's typical for any product within this category.

Q. Do you have any feel as to whether some consumers buy based on price?

A. Promotional volume within in this category -- and I don't know an exact number off the top of my head -- but we just went

1 Cornacchiulo - Direct

2 through some of the numbers, but I know it's
3 about 30, maybe 35 percent which is not
4 extremely high.

5 There is always dealing. It's
6 grocery and in grocery there are always
7 promotions and deals and programs.

8 You know, every grocer has a way
9 of attracting the consumer to their category.

10 So, there's definitely
11 promotions, but from what I have seen over the
12 years that's not extremely high, that deal
13 rate.

14 So -- we actually have some of
15 the dealer numbers too if you need them.

16 Q. Let's switch gears a little bit.

17 Have you ever heard of the
18 company GFA Brands?

19 A. Yes.

20 Q. And what do you know about them?

21 A. I know that they have the brand
22 Smart Balance.

23 Q. Do you currently consider GFA
24 Brands a competitor of the Balance Bar
25 Company?

1 Cornacchiulo - Direct

2 A. Currently, right now no.

3 Q. Why not?

4 A. They're not in our category.

5 They are not in our section or even a close in
6 section.

7 So, at this point in time I don't
8 consider them a competitor.

9 Q. Now, suppose they were to
10 introduce a nutrition bar under the Smart
11 Balance mark, would you then consider them a
12 competitor?

13 A. Yes.

14 Q. Who are some of your current
15 competitors in the nutrition, energy bar
16 category?

17 A. Clif Bar, Larabar, Kind Bar and a
18 little further out Nature's Valley and some of
19 the granola bars, Kashi could be.

20 We have some cross purchasing
21 with people like Kashi and so forth.

22 Zone is definitely a real close
23 in.

24 Q. Do any of those other companies
25 use the term "balance" in their trademarks?

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A. No.

Q. If GFA Brands would begin selling a nutrition bar under its Smart Balance trademark, do you believe that that would cause confusion in the marketplace?

A. Yes.

Q. Can you expand on that?

A. Balance stands for healthy nutrition and healthy eating.

If you look at Smart Balance, the way they describe themselves with the cholesterol and healthy eating and heart healthy and so forth, I think that Balance users would perceive that it's an extension of our brand.

We've had Bare, we've had Gold, we've had ^N~~n~~imble. We have had extensions before and currently still do with Dark and so forth.

Some have slightly different connotations to the Balance proposition, and I think that the consumer base would at least question it, and, you know, look at it and say oh, look, there's another Balance product.

Cornacchiulo - Direct

Q. Do you think the Smart Balance mark is similar to the Balance or Balance Bar trademarks?

A. I think it's very close in. I think their perception on health is similar to our perception on health. They may take a slightly different approach with, you know, what they are calling healthy, but as we expand into different health propositions with Balance Bar within our category I think they could get closer and closer if they had a bar product.

Q. Let's talk a little bit about where the products are located in the store.

Do we sometimes sell our product, let's say, at the checkout counter?

A. We've had checkout programs in some stores.

You will have end caps in others or a second location. Depends on the store's promotions. Some do front end promotions. It depends on, again, what deal you have with the account.

We did off-shelf at Kroger where

Cornacchiulo - Direct

we did something with Vitamin Water where we were in a completely different section of the store.

Q. Now, do you think in those applications, let's say the front counter location, consumers are more likely to make this sort of impulse purchase on the spot?

A. Yeah, I think you have impulse buys in this category because it is -- it's an on-the-go nutrition. So, you'll see some impulse purchasing. There is no doubt about that.

The loyalists come consistently because they are looking for that nutrition.

There are other people looking for, hey, I need something right now to satisfy my need.

So, you have both sides of the spectrum on that.

MR. SCHROEDER: Let's take a break, a five-minute break.

(Discussion off the record.)

Q. Before that break we spoke a little bit about the loyalty among Balance and

Cornacchiulo - Direct

Balance Bar customers.

Could you speak a little bit about, to the extent of your knowledge, percentage of customers who are loyal and the purchasing patterns of those loyal customers?

A. Yeah.

So, we have a strong following of what we will call heavy users. They're, you know, approximately say 7 percent of the overall consumers, but they purchase 60 plus percent of the volume.

They are extremely loyal. They consistently come back. They buy a lot of product. They know the brand very well.

That is the base of our foundation for the brand. It gives you a good foundation obviously.

When we purchased the company we found that they had a good loyal base of consumers, and we are going to hopefully expand on that with our advertising.

So, now that user base is important to us because they are the ones who have a good perception of what the brand

Cornacchiulo - Direct

stands for, and always looking to new products, new innovation. They would be the first to try anything within our category or within the brand obviously.

Q. So, if one of those loyal consumers saw a Smart Balance nutrition bar, what might be the reaction?

A. They would be the most exposed to trying that new product if the perception in their mind is it was similar or close into what they thought was a Balance product.

So, if they thought that was part of Balance Bar they would most likely try, which is, you know, a big issue for us because that's our heaviest user and our heaviest consumption.

Q. So, is it your opinion or your impression that those loyal customers would likely be confused upon seeing a Smart Balance nutrition bar?

A. Yes, because of the perception of what we stand for and our healthy lifestyle perception, and what the brand image has been over the years.

Cornacchiulo - Cross

And also where we are moving I would at least believe or think that that would be one of our items.

MR. SCHROEDER: Nothing further from me today.

CROSS-EXAMINATION BY

MS. WILBERT:

Q. Could you please take out Exhibit 49 in the pile in front of you?

A. Sure.

Q. Could you please confirm that Exhibit 49 is titled NBTY Active Nutrition Tracker, April 2013?

A. Yes.

Q. Could you please turn to the page that's marked BB1959?

A. Yes.

Q. This is one of the pages that you were discussing earlier in your testimony today; correct?

A. Yes.

Q. And this page shows brand awareness unaided and total among the general population; is that correct?

Cornacchiulo - Cross

A. That's correct.

Q. Looking at the chart it shows a dotted line that's titled category average.

What does that mean?

A. That category average is amongst all of the brands listed here.

Q. And amongst all of the brands listed there, does this chart show that Balance Bar's total awareness is lower than the category average?

A. Yes.

Q. What is the number associated with the category average?

A. A little bit above 47 it looks like -- below 47, sorry because Luna is slightly above the line.

So, I would say 45ish.

Q. And discussing the range of total awareness, would you agree that for the products listed in this chart, the range of total awareness is 88 for the Special K Protein Bar all the way down to 11 for the Detour Bar; is that correct?

A. Yes.

Cornacchiulo - Cross

Q. Could you please turn to Page 1960?

Can you confirm that Page 1960 shows brand awareness unaided and total among category users?

A. Yes.

Q. And do you agree that this chart shows again that the Balance Bar total awareness is below the category average for category users?

A. Yes.

Q. And do you agree that the range for total awareness ranges from 96 percent for Special K Protein Bars down to 18 percent for Detour Bars; is that correct?

A. Yes.

Q. Earlier in your testimony you mentioned drinks and milk.

Is Balance Bar planning to offer a milk-based drink?

A. We are looking at milk-based options and water-based options.

Q. Has Balance Bar offered a milk-based product in the past?

Cornacchiulo - Cross

A. Not to my knowledge.

Q. Does Balance Bar believe there would be any confusion with a milk-based product with the Balance Bar branded product and the Smart Balance milk products?

A. When we say milk-based, it sits in the nutrition section. It wouldn't be anything that would be near dairy or outside of, you know, I will say our pharmacy side of the business.

So, it would sit with the protein drinks and so forth or next to the weight loss drinks or things like that.

Q. Do you understand that this opposition is about snack foods?

A. Yes.

Q. And do you consider Balance Bar to be offering snack foods?

A. Yes, on-the-go nutrition is a snacking occasion.

Q. Could you take out the exhibits that were previously marked as Opposer's Exhibits 45, 46, 47 and 48.

A. Yes.

Cornacchiulo - Cross

Q. At the top of all of these documents it appears that there is a law firm's name; is that correct?

A. Yes.

Q. Did that law firm prepare the documents?

A. To my knowledge I would say yes.

Q. Did you have any personal involvement in preparing any of the documents that have been marked as Exhibits 45 through 48?

A. No.

Q. As part of your duties do you regularly prepare cease and desist letters for trademark infringement?

A. I don't prepare them, but we participate in the questions that are asked, yes.

Q. And how often do you participate in cease and desist letters?

A. Probably on average we might do three or four a year depending on the brands.

Q. Are the exhibits marked as 45 through 48 all of the cease and desist letters

Cornacchiulo - Cross

that were sent in 2011 and 2012?

A. I'm not sure.

MS. WILBERT: I am going to make a hearsay objection to submitting these because I don't believe he has personal knowledge or would be a custodian of record to get these in under the business record exception.

Q. Could you take out Exhibits 33 through 44.

Could you look through these exhibits, and let me know if you have personal knowledge of preparing any of the exhibits that have been marked as 33 through 44?

A. No, I wasn't a part of these preparations.

Q. Are part of your job duties regularly drafting trademark license agreements?

A. Can you elaborate on that?

Because there are licensing agreements versus trademark agreements.

If we license something, yes, I have a lot to do with the licensing agreement,

Cornacchiulo - Cross

if I license out the name to somebody.

The trademark is if we have a, if we are contesting something from the brand side we work closely with the Legal Department to draw up the documentation, and then we kind of say here is what we see in the marketplace. Here's the brands that we feel are infringing, and here's the issues that we see.

So, the brand teams and us will work closely with the Legal Department to, you know, develop a response.

Q. Who was responsible for preparing the documents that are marked as Exhibits 33 through 44?

A. These are --

Q. And if it's not possible to group them, let me know.

A. These documents were prepared prior to our purchase.

So, I wouldn't -- I don't know the actual person that prepared them at the time, but they came with the purchase of the company and as part of the records of the business.

Cornacchiulo - Cross

So, these are all prior to -- let me just make sure I'm saying it right -- these are all prior to our purchase of the company. So, these were documents that were prepared by the original Balance Bar Company.

Q. Earlier in your testimony I believe you mentioned some of the other brands that Balance Bar has as trademarks. You mentioned Bare, nimble, Gold and Dark; is that correct?

A. Yes.

Q. For all of those trademarks is "balance" the first word in those composite marks?

A. Yes.

Q. Do you have any trademarks for the Balance Bar Company that is at issue in this case in which "balance" is not the first word?

A. No.

Q. Are you personally aware of any circumstance in which the source or affiliation of a product produced by Balance Bar was confused with a product produced by

Cornacchiulo - Cross

GFA that contains the Smart Balance trademark?

A. Go back in.

A source meaning?

Q. Who manufactures the product.

Are you aware of any consumers that were confused about source or affiliation between a Balance Bar product and a GFA product that bears the Smart Balance trademark?

A. Not to my knowledge.

Q. Are you aware of any instances of actual confusion between a Balance Bar product and a product produced by GFA that bears the Earth Balance trademark?

A. Not to my knowledge.

Q. Are you aware of any circumstances of actual confusion where a Balance Bar product was confused with another product that bore the term "balance" on its label?

A. When you say actual confusion, are you saying do we have a record of somebody actually responding to that?

Q. Correct.

Cornacchiulo - Redirect

A. Okay.

Not to my knowledge.

MS. WILBERT: I have no further questions.

MR. SCHROEDER: I have a few redirect questions.

REDIRECT EXAMINATION BY

MR. SCHROEDER:

Q. If I could ask you to look again at Exhibits 33 to 44 which are a collection of Settlement Agreements.

And as you just testified you do not have any firsthand involvement with the preparation and execution of these Settlement Agreements; is that correct?

A. Yes.

Q. Looking at each of these agreements, can you testify today that each one of these is a business record of the company?

A. Yes.

Q. And can you testify today that as part of the purchase of Balance Bar Company by NBTY that business records were transferred

Cornacchiulo - Redirect

from the prior ownership to NBTY?

A. Yes, they were.

Q. And to the best of your knowledge were these records transferred along with those business records?

A. Yes.

Q. Thank you.

Can I next ask you to take a look at what were marked as Exhibits 45 to 48, and, again, you testified that you didn't have any firsthand involvement in the preparation of these letters; correct?

A. Yes.

Q. Do you recognize each one of these exhibits as a business record of the company?

A. Yes.

Q. And as part of the purchase of the Balance Bar Company by NBTY, were business records transferred to NBTY?

A. Yes, they were.

Q. And were these part of the business records which were transferred from the former ownership to NBTY?

Cornacchiulo - Redirect

A. Yes, they were.

MR. SCHROEDER: Thank you.

Nothing further.

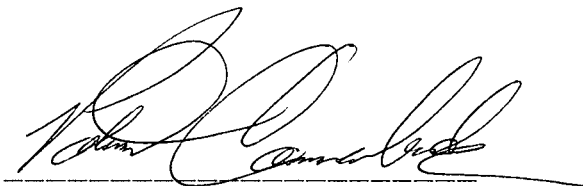
(Time noted: 10:05 a.m.)

Cornacchiulo - Redirect

A C K N O W L E D G M E N T

STATE OF NEW YORK)
 : ss
COUNTY OF)

I, PATRICK CORNACCHIULO, hereby
certify that I have read the transcript of my
testimony taken under oath in my deposition of
May 1, 2014; that the transcript is a true,
complete and correct record of my testimony,
and that the answers on the record as given by
me are true and correct.



PATRICK CORNACCHIULO

Signed and subscribed to before
me, this 3rd day
of November, 2014.


Notary Public, State of New York

CAROL ANN LAHMANN
Notary Public, State of New York
No. 01LA6171325
Qualified in Suffolk County
Commission Expires July 23, 2015

-----I N D E X-----

| WITNESS | DIRECT | CROSS | REDIRECT |
|---------|--------|-------|----------|
|---------|--------|-------|----------|

| | | | |
|----------------------|---|----|----|
| PATRICK CORNACCHIULO | 3 | 41 | 50 |
|----------------------|---|----|----|

-----EXHIBITS-----

| OPPOSER'S | FOR I.D. |
|-----------|----------|
|-----------|----------|

| | | |
|----|---|---|
| 33 | Copy of multipage document entitled Agreement, Bates stamped BB0001903 through BB0001920 | 3 |
|----|---|---|

| | | |
|----|--|---|
| 34 | Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001851 through BB0001857 | 3 |
|----|--|---|

| | | |
|----|--|---|
| 35 | Copy of three-page letter, dated April 8, 2002, Bates stamped BB0001848 through BB0001850 | 4 |
|----|--|---|

| | | |
|----|--|---|
| 36 | Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001843 through BB0001847 | 4 |
|----|--|---|

-----EXHIBITS (Continued)-----

OPPOSER'S

FOR I.D.

| | | |
|----|--|---|
| 37 | Copy of three-page letter, dated February 5, 2003, Bates stamped BB0001835 through BB0001837 | 4 |
| 38 | Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001838 through BB0001842 | 4 |
| 39 | Copy of multipage document entitled Agreement, Bates stamped BB0001814 through BB0001817 | 4 |
| 40 | Copy of multipage document entitled Settlement Agreement and Release, Bates stamped BB0001818 through BB0001821 | 4 |
| 41 | Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001823 through BB0001828 | 5 |

-----EXHIBITS (Continued)-----

OPPOSER'S

FOR I.D.

| | | |
|----|--|----|
| 42 | Copy of multipage document entitled Agreement, Bates stamped BB0001808 through BB0001813 | 5 |
| 43 | Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001802 through BB0001807 | 5 |
| 44 | Copy of multipage document entitled Settlement Agreement, Bates stamped BB0001798 through BB0001801 | 5 |
| 45 | Copy of multipage document, cover page being a letter dated May 9, 2011, Bates stamped BB0000816 through BB0000827 | 14 |
| 46 | Copy of three-page letter dated March 9, 2012, Bates stamped BB0001924 through BB0001926 | 14 |

-----EXHIBITS (Continued)-----

OPPOSER'S

FOR I.D.

| | | |
|----|---|----|
| 47 | Copy of three-page letter dated May 25, 2012, Bates stamped BB0001921 through BB0001923 | 14 |
| 48 | Copy of four-page document, cover page being a letter dated October 3, 2012, Bates stamped BB0000812 through BB0000815 | 14 |
| 49 | Copy of multipage document entitled NBTY Active Nutrition Tracker, Pre-Campaign Topline April 2013, Bates stamped BB0001955 through BB0001974 | 23 |

(Reporter retained exhibits.)

| | | | | |
|---|---|--|--|--|
| <p>#</p> <p>#605 [1] - 2:5</p> <p>'90s [2] - 13:24, 14:5</p> <p>0</p> <p>0 [1] - 28:7</p> <p>1</p> <p>1 [3] - 1:20, 53:10, 58:11</p> <p>10 [1] - 1:9</p> <p>10:05 [1] - 52:5</p> <p>11 [2] - 27:13, 42:23</p> <p>110 [1] - 2:5</p> <p>11702 [2] - 1:24, 2:6</p> <p>11779 [1] - 3:13</p> <p>124 [1] - 1:23</p> <p>14 [4] - 56:20, 56:24, 57:7, 57:12</p> <p>15 [2] - 30:2, 30:19</p> <p>17 [1] - 27:16</p> <p>18 [2] - 28:4, 43:15</p> <p>18th [1] - 26:11</p> <p>1960 [2] - 43:3, 43:4</p> <p>2</p> <p>20 [1] - 1:8</p> <p>2002 [2] - 4:2, 54:17</p> <p>2003 [2] - 4:12, 55:5</p> <p>2010 [2] - 1:8, 1:9</p> <p>2011 [3] - 14:11, 46:2, 56:18</p> <p>2012 [8] - 11:18, 14:15, 14:19, 14:24, 46:2, 56:22, 57:5, 57:10</p> <p>2013 [5] - 23:8, 25:25, 26:4, 41:14, 57:16</p> <p>2014 [5] - 1:20, 53:10, 53:20, 58:11, 58:19</p> <p>202 [1] - 1:23</p> <p>21 [1] - 29:14</p> <p>2100 [2] - 1:19, 3:12</p> <p>23 [1] - 57:17</p> <p>25 [2] - 14:19, 57:5</p> <p>29 [1] - 28:7</p> <p>3</p> <p>3 [5] - 14:24, 54:4, 54:11, 54:15, 57:10</p> | <p>30 [2] - 31:13, 34:3</p> <p>31st [1] - 26:12</p> <p>33 [9] - 3:16, 5:25, 6:10, 8:11, 46:10, 46:15, 47:14, 50:11, 54:8</p> <p>34 [9] - 3:20, 7:15, 8:11, 26:23, 27:13, 29:20, 29:21, 54:12</p> <p>35 [6] - 3:25, 7:20, 8:3, 8:11, 34:3, 54:16</p> <p>36 [4] - 4:5, 8:7, 8:11, 54:20</p> <p>37 [8] - 4:10, 8:10, 8:12, 8:14, 8:16, 8:19, 8:20, 55:4</p> <p>38 [5] - 4:14, 8:8, 8:18, 9:7, 55:7</p> <p>39 [3] - 4:19, 9:10, 55:11</p> <p>4</p> <p>4 [11] - 26:22, 27:17, 27:19, 28:8, 54:19, 54:23, 55:6, 55:10, 55:14, 55:18</p> <p>40 [3] - 4:23, 9:13, 55:15</p> <p>41 [4] - 5:4, 9:17, 54:4, 55:19</p> <p>411 [1] - 2:11</p> <p>42 [3] - 5:9, 9:24, 56:4</p> <p>43 [4] - 5:13, 10:3, 29:13, 56:8</p> <p>44 [9] - 5:18, 5:25, 10:6, 10:9, 46:11, 46:15, 47:15, 50:11, 56:12</p> <p>45 [7] - 14:9, 15:5, 44:24, 45:11, 45:24, 51:10, 56:16</p> <p>45ish [1] - 42:18</p> <p>46 [4] - 14:14, 15:25, 44:24, 56:21</p> <p>47 [6] - 14:18, 16:11, 42:15, 42:16, 44:24, 57:4</p> <p>48 [8] - 14:22, 15:5, 16:17, 44:24, 45:12, 45:25, 51:10, 57:8</p> <p>49 [8] - 23:4, 23:5, 23:12, 28:4, 29:12, 41:10, 41:13, 57:13</p> <p>5</p> <p>5 [7] - 4:11, 24:13, 55:5, 55:22, 56:7, 56:11, 56:15</p> | <p>50 [1] - 54:4</p> <p>516-938-4000 [1] - 1:24</p> <p>53202-4497 [1] - 2:12</p> <p>6</p> <p>60 [2] - 27:13, 39:11</p> <p>7</p> <p>7 [2] - 29:14, 39:10</p> <p>75 [1] - 28:4</p> <p>77/864,206 [1] - 1:6</p> <p>77/864,268 [1] - 1:7</p> <p>8</p> <p>8 [2] - 4:2, 54:17</p> <p>88 [1] - 42:22</p> <p>8th [1] - 58:18</p> <p>9</p> <p>9 [4] - 14:11, 14:15, 56:18, 56:22</p> <p>91196954/91197748 [1] - 1:17</p> <p>96 [1] - 43:14</p> <p>9:30 [1] - 1:21</p> <p>A</p> <p>a.m [2] - 1:21, 52:5</p> <p>abbreviation [1] - 9:21</p> <p>account [1] - 37:24</p> <p>accurate [1] - 58:10</p> <p>action [1] - 58:14</p> <p>Active [2] - 23:6, 57:14</p> <p>active [3] - 11:7, 23:14, 41:13</p> <p>activities [2] - 17:3, 17:9</p> <p>actual [4] - 47:22, 49:13, 49:18, 49:22</p> <p>address [1] - 3:11</p> <p>advertising [2] - 11:12, 39:22</p> <p>affiliation [2] - 48:24, 49:7</p> <p>ago [1] - 26:5</p> <p>agree [3] - 42:20, 43:8, 43:13</p> <p>agreement [19] - 6:11, 7:16, 7:23, 7:25, 8:4, 8:8, 8:9, 8:14, 8:16, 8:23, 9:4, 9:7, 9:10, 9:14, 9:18, 9:24, 10:4, 10:10, 46:25</p> | <p>Agreement [20] - 3:17, 3:22, 4:7, 4:16, 4:20, 4:25, 5:6, 5:10, 5:15, 5:20, 54:9, 54:13, 54:21, 55:8, 55:12, 55:16, 55:20, 56:5, 56:9, 56:13</p> <p>agreements [8] - 7:10, 16:23, 46:20, 46:23, 50:12, 50:16, 50:19</p> <p>aided [6] - 25:8, 25:9, 25:15, 26:22, 27:23, 28:5</p> <p>ALSO [1] - 2:15</p> <p>analysis [1] - 30:22</p> <p>analyst [2] - 28:17, 31:3</p> <p>AND [2] - 1:2, 1:3</p> <p>answers [1] - 53:12</p> <p>APPEAL [1] - 1:3</p> <p>appear [3] - 26:19, 29:8, 29:9</p> <p>Applicant [2] - 1:16, 2:9</p> <p>Application [1] - 1:6</p> <p>applications [1] - 38:6</p> <p>approach [1] - 37:8</p> <p>April [8] - 1:8, 4:2, 23:8, 25:24, 26:3, 41:14, 54:17, 57:16</p> <p>Arizona [1] - 10:2</p> <p>associated [1] - 42:13</p> <p>attracting [1] - 34:9</p> <p>August [1] - 1:9</p> <p>Avenue [3] - 1:19, 2:11, 3:12</p> <p>average [6] - 42:4, 42:6, 42:11, 42:14, 43:10, 45:22</p> <p>aware [5] - 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C E R T I F I C A T E

STATE OF NEW YORK)

) ss.:

COUNTY OF NASSAU)

I, DEBORAH ROZEA, a Notary Public
within and for the State of New York, do
hereby certify that the within is a true
and accurate transcript of the
proceedings taken on May 1, 2014.

I further certify that I am not
related to any of the parties to this
action by blood or marriage; and that I
am in no way interested in the outcome
of this matter.

IN WITNESS WHEREOF, I have
hereunto set my hand this 8th day of
May, 2014.

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DEBORAH ROZEA, RPR

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application Serial Nos. 77/864,206 and 77/864,268
Published for Opposition on April 20, 2010 and August 10, 2010
Trademark: SMART BALANCE

BALANCE BAR COMPANY,

Opposer,

v.

GFA BRANDS, INC.,

Applicant.

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: Opposition Nos.
: 91196954/91197748
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**ERRATA SHEET TO TRIAL TESTIMONY TRANSCRIPT OF
PATRICK CORNACCHIULO**

| PAGE | LINE | CORRECTION | REASON |
|------|------|-----------------------------|---------------------|
| 12 | 5 | From “up until” to “as of” | Transcription Error |
| 17 | 10 | From “placed” to “polices” | Transcription Error |
| 27 | 17 | From “balance” to “Balance” | Punctuation Error |
| 30 | 24 | From “It’s” to “It’s a” | Transcription Error |
| 33 | 9 | From “for” to “far” | Transcription Error |
| 36 | 18 | From “nimble” to “Nimble.” | Punctuation Error |
| 38 | 10 | From “buy” to “buys” | Transcription Error |